No. 83-1522 (7) COPY

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

REDDING FORD, a corporation,

Petitioner,

vs.

CALIFORNIA STATE BOARD OF EQUALIZATION, an agency of the State of California, GEORGE R. REILLY, ERNEST J. DRONENBERG, JR.,

WILLIAM M. BENNETT, RICHARD NEVINS and KENNETH CORY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN K. VAN DE KAMP
Attorney General
ARTHUR C. DE GOEDE
Assistant Attorney General
TIMOTHY G. LADDISH
Deputy Attorney General
CALVIN J. ABE
Deputy Attorney General and
Counsel of Record
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-2719
Attorneys for Respondents

29 pp

QUESTIONS PRESENTED

1. Did the Ninth Circuit correctly affirm the dismissal for lack of subject matter jurisdiction of petitioner's complaint challenging the constitutionality of the assessment of use taxes on leases of motor vehicles, on the ground that the complaint was barred by 28 U.S.C. § 1341, where petitioner alleged in its complaint that it did not have sufficient funds to invoke the California procedure of prepaying the tax and filing a suit for refund?

2. Did the Ninth Circuit correctly affirm the District Court's decision that it was barred by 28 U.S.C. § 1341 from invoking ancilliary jurisdiction based upon the judgment rendered in United States v. California State Board of Equalization, No. 79-03359-R (C.D. Cal. 1979), aff'd 456 U.S. 901 (1982), cert. den. 456 U.S. 985 (1982), reh. den. 456 U.S. 985 (1982)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES PAGE

No. 83-1522

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

REDDING FORD, a corporation,

Petitioner,

vs.

CALIFORNIA STATE BOARD OF EQUALIZATION, an agency of the State of California, GEORGE R. REILLY, ERNEST J. DRONENBERG, JR.,

WILLIAM M. BENNETT, RICHARD NEVINS and KENNETH CORY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

The Tax Injunction Act, 28 U.S.C. § 1341 (hereinafter "§ 1341") prohibits district courts from enjoining the collection of any state

taxes when a "plain, speedy and efficient" remedy may be had in the state courts.

Petitioner argues that it has no "plain, speedy and efficient" remedy under state law because it does not have sufficient assets to take advantage of California's refund procedure which provides for payment of the taxes and administrative proceedings before the taxes' legality can be tested in court in a refund action.

Petitioner filed a complaint in the District Court seeking a judicial declaration as to the validity of the assessed use taxes, and an injunction restraining respondents California State Board of Equalization and its individual members (hereinafter "Board") from collecting the assessment.

Petitioner filed a motion for preliminary injunction under Rule 65(a)

and (b) of the Federal Rules of Civil Procedure. Respondent filed a motion to dismiss the action pursuant to Rule 12 of the Federal Rules of Civil Procedure.

The District Court granted respondents' motion to dismiss. Petitioner appealed said decision to the Ninth Circuit.

The Ninth Circuit affirmed the judgment of dismissal on the same ground, that the action was barred by § 1341. Consistent with its previous ruling in Wood v. Sargeant, 694 F.2d 1159 (9th Cir. 1982), the Ninth Circuit held that California's prepayment and suit for refund procedure is "plain, speedy and efficient" within the meaning of § 1341, and that a demonstrated inability to prepay a tax in accordance with such procedure does not overcome the jurisdictional bar of § 1341. The Ninth Circuit further held that it was

barred under § 1341 from invoking ancillary jurisdiction based upon United States v. California State Board of Equalization, supra.

REASONS FOR DENYING THE WRIT

1. THE NINTH CIRCUIT DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN ROSEWELL, NOR IS THERE A CONFLICT BETWEEN THE CIRCUITS.

A. There Is No Conflict With This Court's Decision In Rosewell.

One of petitioner's grounds for the issuance of this writ is an alleged conflict between the Ninth Circuit's decision in this case and this Court's decision in Rosewell v. La Salle National Bank, 450 U.S. 803 (1981).

In fact, the Ninth Circuit cited Rosewell both in the instant case and in Wood v. Sargeant, supra, as a precedent it was following in holding that the inability to prepay a tax in accordance with California's refund procedure does not

avoid the jurisdictional bar of § 1341. The Ninth Circuit viewed such decisions to be entirely consistent with and based upon Rosewell, and clearly not in conflict with it. Id., pp. 1160-1161.

Petitioner's argument that the Ninth Circuit's decision herein is in conflict with Rosewell is based entirely on dicta from Rosewell which it has chosen to interpret adversely to respondent. In Rosewell, this Court, in reversing the decision of the Seventh Circuit, held that the action was barred under § 1341 even though the Illinois refund procedure did not provide for the payment of interest on tax refunds. This Court focused on Illinois' refund procedure, and concluded that it met the applicable "procedural criteria" such that it qualified as being "plain, speedy and efficient."

The Illinois and California

refund procedures are virtually identical in that both provide for prepayment of the tax and a full hearing at which taxpayer may raise all constitutional objections to the tax. Id., p. 514; Cal. Rev. and Tax Code § 6933; Capitol Industries - EMI, et al. v. Bennett, 681 F.2d 1107, 1117 (9th Cir. 1982), cert. den. 455 U.S. 943 (1982). The only apparent difference is that in California, interest is paid on tax refunds. Cal. Rev. and Tax Code § 6936. Moreover, there can be no conflict between Rosewell and the instant case because in Rosewell, the taxpayer made no allegation of the inability to prepay as was made in the instant case. Therefore, in Rosewell, this Court could not have and indeed, did not reach the specific issue involving the alleged inability to prepay a tax, that was raised in this petition.

Consistent with the decision in the instant case, this Court in Rosewell approved state procedures requiring pre-payment of the taxes and suits for refund in stating the following:

> "When it passed the Act, Congress knew that state tax systems commonly provided for payment of taxes under protest with subsequent refund as their exclusive remedy. The Senate Report to the Act noted:
>
> 'It is the common practice for statutes of the various States to forbid actions in State courts to enjoin the collection of State and County taxes unless the tax law is invalid or the property is exempt from taxation, and these statutes generally provide that

> taxpayers may contest their taxes only in refund actions after payment under protest. This type of State legislation makes it possible for the States and their various agencies to survive while long-drawn-out tax litigation is in progress.' S.Rep. No. 1035, 75th Cong. 1st Sess., p. 1 (1937). See H.R. Rep. No. 1503, 75th Cong., 1st Sess., p. 2 (1937). See also Matthews v. Rogers, 284 U.S. 521, 526, 76 L.Ed. 447, 52 S.Ct. 217 (1932)." Id., p. 523.

In its complaint, petitioner requested that the District Court enjoin the Board from assessing, levying and collecting sales and use taxes. This is directly contrary to the provisions of 28 U.S.C. § 1341, which prohibits such

relief. § 1341 provides that:

> "The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

It is well established that § 1341 is an explicit Congressional limitation on the jurisdiction of the federal courts in cases which would enjoin, suspend or restrain state tax levy, assessment or collection. California v. Grace Brethren Church 457 U.S. 393, 402-409 (1982); Rosewell v. La Salle National Bank, supra, pp. 526-527.

The California tax refund procedures provide the requisite "plain, speedy and efficient" remedy such as to

invoke the restraints of § 1341. California v. Grace Brotheren Church, supra, p. 417; (Aronoff v. Franchise Tax Board of the State of California 348 F.2d 9, 11 (9th Cir. (1965).)

Prior to its decision in Rosewell, this Court had determined that inconvenience in raising the money with which to prepay taxes does not justify federal injunctive relief. California v. Latimer, 305 U.S. 255, 262 (1938).

In the context of § 1341, the argument that a taxpayer has no "plain, speedy and efficient" remedy where the taxpayer's business would be destroyed if state court refund procedures were required was expressly rejected in Matthews v. Rodgers, 284 U.S. 521, 524, 526 (1932). See also, Aronoff v. Franchise Tax Board of the State of California, 348 F.2d 9 (9th Cir. 1965) (where taxpayer argued unsuccessfully at

state court level prior to the federal decision that there was an exception to the anti-injunction provisions where great financial hardship would result; Aronoff v. Franchise Tax Board, 60 Cal.2d 177, 180 (1963).)

Furthermore, Justice Brennan's statement in Perez v. Ledesma, 401 U.S. 82, 127-128, fn. 17 (1971) (Brennan, J., concurring in part and dissenting in part) is particularly relevant here. Even though petitioner Redding Ford must have made purchases in excess of $6 million for the tax period in question in order for the use tax liability herein to have arisen, petitioner allegedly has inadequate funds to pursue its state remedies. As Justice Brennan indicated: § 1341 does not permit the possible "shift to the State of the risk of taxpayer insolvency." Id., p. 128. (See also, Rosewell v. La Salle National Bank, supra, pp. 450 U.S. 503, 527-528.

("The reasons supporting federal noninterference are just as compelling today as they were in 1937 [year 28 U.S.C. 1341 enacted]")).

B. There Is No Conflict Between The Circuits, Or With Other Decisions By This Court.

Petitioner's contention that the Ninth Circuit's decision herein is in conflict with decisions in other circuits, and with other decisions by this Court are also without merit. In none of the cases cited by petitioner has any court held that the alleged inability to prepay a tax in accordance with a state's suit for refund procedure avoids the jurisdictional bar of § 1341. Apparently the Ninth Circuit is the first circuit to squarely decide this issue, which it has done on two occasions; first in Wood v. Sargeant, 694 F.2d 1159 (1982), and then in the instant case, at 722 F.2d 496 (1983). It is clear that until at least

one other circuit also addresses this issue and decides it contrary to the Ninth Circuit, no conflict between the circuits exists as to this issue, and this petition is at best, premature. Indeed, with the benefit of two Ninth Circuit decisions on this point, the other circuits might well find themselves in agreement with the Ninth Circuit's analysis. At this point, it is speculative to guess how the other circuits might decide this issue when the appropriate facts are put before them. As discussed above, none of the cases cited by petitioner involves the issue of the inability to prepay, and none have held a refund procedure like California's not to be "plain, speedy and efficient" within the meaning of § 1341. In Tully v. Griffin, Inc., 429 U.S. 68 (1976) this Court reversed the District Court's ruling that New York

law did not provide the taxpayer a the taxpayer a "plain, speedy and efficient" remedy because he lacked the means to prepay the assessment or post a bond in accordance with New York's refund procedure. Id., pp. 69-71. This Court instead concluded that New York law did provide the taxpayer a "plain, speedy and efficient" remedy due to the existence of an alternate remedy, and expressly did not reach the question of whether its refund procedure (N.Y. Civ. Proc. Art. 78) would also be "plain, speedy and efficient." Id., p. 76, fn. 8.

In Hillsborough v. Cromwell, 326 U.S. 620 (1946), this Court held that due to the uncertainty surrounding whether the New Jersey state courts could pass on constitutional questions, the bar of § 1341 would be lifted. Id., pp. 625-626. Under New Jersey law, the taxpayer's right of review of

constitutional questions by the New Jersey judiciary was dependent upon the discretionary grant of certiorari to the New Jersey Supreme Court. Ibid. In California, it is clear that all constitutional challenges to the assessment can be addressed. Capitol Industries EMI, Inc. v. Bennett, 681 F.2d 1107, 1117, (9th Cir. 1982), cert. den. 455 U.S. 943 (1982).

As this Court noted in Rosewell in discussing Hillsborough, the key regarding certainty of remedy under Section 1341 is not whether there is a substantive chance for success in state court, but whether there is a "procedural mechanism" for the taxpayer in state court to assert all of its claims, constitutional or otherwise. Rosewell v. La Salle National Bank, supra, pp. 512-517.

In Denton v. City of

Carrolltown, Georgia 235 F.2d 481 (5th Cir. 1956), the Fifth Circuit held that Section 1341 did not bar federal jurisdiction because there was actual doubt concerning the recoverability of the "punitive" license taxes involved therein due to the uncertainty of the Georgia refund procedures. Id., pp. 485-486. Unlike Georgia law, there is no doubt or uncertainty regarding the recoverability of the full amount of taxes paid in a California refund action, if appropriate. The "procedural mechanism" for a full refund exists under California law.

In Ludwin v. City of Cambridge, 592 F.2d 606 (1st Cir. 1979), the First Circuit upheld the District Court's dismissal of plaintiff's request for declaratory relief seeking a declaration that Massachusetts' law requiring payment of real estate taxes prior to judicial review was a denial of procedural due

process. The Court indicated that it believed that plaintiff's state remedy in that case was "adequate" as argued therein. Likewise, petitioner's remedy herein is adequate.

In 28 East Jackson Enterprises, Inc. v. Cullerton 523 F.2d 439 (7th Cir. 1975), cert den. 423 U.S. 1973, reh. den. 424 U.S. 959 (1976), the Seventh Circuit reversed the District Court's order granting plaintiff prelimi nary injunctive relief based on its belief that it was "reasonably certain" that the State of Illinois would entertain a suit for injunctive relief. This dicta does not require this Court to adopt its converse, i.e., that if it were not "reasonably certain" that a state court would entertain a suit for injunctive relief, the District Court properly issued injunctive relief. The court concluded that the taxpayer must

seek equitable relief in the state court, and directed the District Court to dismiss the suit for injunction for lack of jurisdiction.

In Capitol Industries-EMI, Inc. v. Bennett, 681 F.2d 1107 (9th Cir. 1982), two separate actions were brought against the Franchise Tax Board and its members to enjoin a proposed assessment against Capitol. The Ninth Circuit held that as to Capitol, the California refund procedure is "plain, speedy and efficient" and dismissed the complaint under § 1341. As to EMI, since it was not the taxpayer being assessed, the California refund procedure was not applicable to it. The court thus concluded EMI's action was not barred under § 1341. The court explicitly did not reach the question of whether the inability to prepay an assessment may render the California remedy to be of

"doubtful efficiency" as it later did in Wood v. Sargeant, 694 F.2d 1159 (9th Cir. 1982), and in this case. As discussed infra, the Ninth Circuit held in Wood that the inability to pay does not avoid the jurisdictional bar of § 1341.

Two recent decisions, both involving the California requirement that disputed taxes must be paid prior to judicial review, clearly resolve any doubt that the Ninth Circuit's decision in this case was correct.

In California v. Grace Brethren Church 457 U.S. 393 (1982), a number of California churches and religious schools challenged an unemployment compensation tax scheme which did not exempt religious schools unaffiliated with any church. On direct appeal, this Court ruled that § 1341 barred the injunctive relief granted by the

District Court on grounds thatthe taxpayers had a plain, speedy and efficient state court remedy. Moreover, this Court held that since there would be little practical difference between injunctive and declaratory relief in terms of their potential impact on the prompt collection of taxes, both forms of relief must be barred. Id. pp. 407-409. Based on the intent of Congress "to limit drastically" federal court interference with state tax systems, the court construed narrowly the "plain, speedy and efficient" exception to the Tax Injunction Act. (28 U.S.C. section 1341). Id., p. 413.

Wood v. Sargeant, supra, involved the identical issue of the inability to prepay. The court unequivocally rejected the taxpayer's inability to prepay argument and affirmed the District Court's judgment dismissing the action. In crystal clear language the

court held:

> "In none of these cases, however, did we decide whether a plaintiff's inability to pay the tax renders the state remedy, as to that plaintiff, one which is not 'efficient', or one which cannot 'be had in the courts of [the] State' (§ 1341). We now hold that inability to pay the tax does not avoid the jurisdictional bar of § 1341." Id. at p. 1162.

As pointed out by the court in Wood, the potential for abuse of the orderly administration of state tax laws is great. Id., p. 1161. If petitioner's position is adopted, federal actions for injunction containing allegations of the inability to prepay the tax will vastly

increase, resulting in the disruption both of the state's administration of its tax laws and of the federal courts.

Petitioner also argues that an inability of California courts to grant injunctive relief causes its remedies to be inadequate and inefficient within the meaning of § 1341. There is no authority which establishes that a lack of pre-payment injunctive relief renders a state's remedies inadequate or inefficient under section 1341. In fact, such a result would be directly contrary to all of the cases which have found the California tax refund procedure to be "plain, speedy and efficient."

Therefore, the District Court correctly dismissed plaintiff's complaint on grounds that the relief sought was barred by § 1341.

/

/

2. NO OTHER BASIS FOR JURISDICTION EXISTS

Petitioner's argument that the District Court should exercise ancillary or pendent jurisdiction to avoid the bar of § 1341 because allegedly its interests are identical to those of the United States in United States v. California State Board of Equalization, No. 79-03359-R (C.D. Cal. 1979), aff'd in part, vac'd in part, 650 F.2d 1127 (9th Cir. 1981); aff'd 456 U.S. 901 (1982), reh. den. 456 U.S. 985 (1982), is completely unsupported by any authority.

Nothing prevents petitioner from asserting the federal doctrine of collateral estoppel in a state court refund action and thereby raise the effect of the decision reached in United States v. California State Board of Equalization. Indeed petitioner has not argued to the contrary. Therefore,

argued to the contrary. Therefore, petitioner is being deprived of no federal rights by being required to litigate its state tax liability in state court.

Moreover, as acknowledged by petitioner (Petition, p. 18), that case involved only sales tax, not use tax as in this case. Therefore, the two cases involve a different kind of tax, which would make it impossible for petitioner to assert an identity of interests with the United States in that case. Not only are the parties in the two actions different, they do not even involve the same tax.

Petitioner further argues that it is a third party beneficiary of the judgment in question. However, it has cited absolutely no authority supporting this as a basis for invoking ancillary jurisdiction.

For the foregoing reasons, there is absolutely no basis for this Court to invoke ancillary jurisdiction.

CONCLUSION

For all of the foregoing reasons, the Petition For Writ of Certiorari should be denied.

DATED: June 7, 1984

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General

ARTHUR C. DE GOEDE
Assistant Attorney General

TIMOTHY G. LADDISH
Deputy Attorney General

CALVIN J. ABE

CALVIN J. ABE
Deputy Attorney General and
Counsel of Record

Attorneys for Respondent